MOHD. SHARIFF RANTAU

v.

HJ. ZAINAL ABIDIN HJ. YAACOB

HIGH COURT MALAYA, KOTA BHARU
EUSOFF CHIN J
[CIVIL SUIT NO. 112/80]
24 JANUARY 1984

TORT: *Negligence - Liability - Whether plaintiff to be blamed - Safe system of work - Whether applicable - Non-provision of by the employer.*

The plaintiff was employed as a driver by the defendant to transport logs from the defendant's forest concession to the defendant's timber store using the defendant's old logging vehicle. On the day in question, the plaintiff was driving the vehicle loaded with logs ascending a slope when the gears of the vehicle became disengaged and caused the vehicle to slide down and overturn. As a result of the accident the plaintiff's left femur was fractured and his left leg was shortened by 3.5 cm. He claimed damages against the defendant for injuries suffered.

Held:

[1] The plaintiff was not in any way to be blamed. He had done all he could under the circumstances to prevent the accident from happening.

[2] The defendant (employer) has failed to provide the plaintiff with proper and good quality machinery (vehicle) to perform the work safely. He was totally negligent and therefore liable to the plaintiff for damages.

[Judgment for the plaintiff.]

Case referred to:
Henderson v. Henry E. Jenkins & Sons [1970] AC 282

Other source referred to:
Halsbury's Laws of England, 3rd Edn. Vol. 25, para. 978, p. 511

For the plaintiff - Wan Mustapha; M/s. Wan Mustapha & Co.
For the defendant - Wrigglesworth; M/s. Wrigglesworth & Co.

JUDGMENT

Eusoff Chin J:

The plaintiff claims damages against the defendant for injuries suffered in an accident while the plaintiff was driving the defendant's motor vehicle.

On 25 December 1979, the plaintiff was transporting logs in an old logging vehicle called santaiwong, from the defendant's forest concession at Sungai Goreng to the defendant's timber store at Kampong Gunong. There were 5 logs weighing about 5 tons of the vehicle. He was driving on the old Batu Melintang/Jeli road. When he came to a steel bridge across Sungai Tadoh, he had to use a road diversion which led down to the waters of Sungai Tadoh, then crossed the river where water was about one to two feet deep, and climbed the other side of the river bank to join the Batu Melintang/Jeli road. This was because the steel bridge could not withstand heavy vehicles. The distance between the bridge and water was about

10 feet. The plaintiff crossed the river and stopped the vehicle to engage gear two. The gear engaged all the wheels of the vehicle. The plaintiff did this to enable the vehicle to ascend the slope. He managed to drive the vehicle three quarters up the slope when he heard the engine was suddenly very noisy, and at the same time the gears of the vehicle became disengaged by themselves. The plaintiff thought the gear teeth had broken. The vehicle began to slide backwards. Plaintiff applied the brakes but they could not hold the vehicle, most probably due to the wet brakes, since the vehicle had just passed through the river. The vehicle overturned. The plaintiff was pinned under the vehicle. Plaintiff was taken to the army clinic and then to General Hospital, Kota Bharu. He was hospitalised for one month. He visited the hospital for follow up treatments up to 2 June 1980. His left femur was fractured in the accident and he suffered shortening of 3.5 cm. in the left leg.

The defendant, a licenced logger said that he engaged 3 drivers for his 3 santaiwongs. Plaintiff was one of them. Plaintiff was engaged as a driver to transport logs at RM6 per ton per trip. The plaintiff had to engage his own attendant whom plaintiff paid RM1 per ton of logs transported. The defendant said that he supplied fuel, lubricants and spare parts to the santaiwong, but each driver had to repair his vehicle.

Defendant said he bought the three santaiwongs cheap as they were second-hand (used) vehicles, but were in good condition. The santaiwong used by plaintiff was bought by defendant about eight months prior to the date of accident. If the santaiwong was under repair, there would be no work done by plaintiff, and so the plaintiff would not get any pay. It is admitted by the defendant that since the plaintiff was employed to drive that santaiwong, the defendant had replaced a lot of parts for the vehicle because that vehicle always broke down. It was further admitted by the defendant that the santaiwongs were originally lorries which had been renovated with new chasis and body, but with old engines. Defendant also knew well the route used by the plaintiff to transport the logs. Defendant also said he had to spend a lot of money to repair the vehicle because of the accident.

The defendant called the plaintiff's attendant as a witness, (DW2). DW2 said that he was working for plaintiff as plaintiff's attendant for five months before the accident. He was familiar with the route used by plaintiff as plaintiff had all the time been using that route to transport the logs. DW2 himself never drove the santaiwong. He said on the day of the accident he was seated on the logs behind the driver's cabin. He said that he could see the driver's hands and legs through a hole in the wall of driver's cabin, behind the driver. He said he would look through that hole to see what the driver was doing. He would do this whenever he thought he was in a dangerous situation. On that day the santaiwong had almost reached the top of the slope when DW2 started to look through the hole to see what the driver was doing. He saw the plaintiff manipulating with the gear handles and pressing the clutch and brake pedals. He said the plaintiff was trying to engage the third gear. The vehicle started to slide backwards, slowly at first and DW2 got off the vehicle.

On the question of liability it was submitted by the defence Counsel that the plaintiff's case rests on the duty of the defendant to provide a safe system and effective supervision of work, and since this was a motor accident case, safe system of work did not apply. I do not agree that this is a motor accident case. I am of the view that the employer (defendant) had failed to provide the plaintiff with proper and good quality machinery (vehicle) for plaintiff to perform the work safely. Neither of the Counsel cited any authority to support their contentions, except those on quantum.

In this case the defendant admitted that the santaiwong used by plaintiff was a second-hand lorry which was cheap to buy. Defendant had renewed the body and chasis but had retained the old engine. There is no evidence that the old engine and gear box had been thoroughly overhauled. The santaiwong always broke down, and I think it is safe to infer from the evidence that it was the engine part that constantly broke down, since the defendant had renovated the lorry with new body and chasis. Defendant left all the repairs to be done by the plaintiff. There is no evidence to say that the plaintiff was in any way a qualified mechanic to effect such repairs, although there is evidence that when the santaiwong broke down he carried out the repairs and the defendant supplied the spare parts. There is no evidence at all to show that the defendant had ever engaged, or brought the santaiwong to, a qualified mechanic for inspection of the engine or gear mechanism to ensure that the vehicle was safe for use of transporting heavy loads such as logs, especially when the vehicle had, in the course of its use by the plaintiff, to climb a steep slope. The plaintiff had been driving the santaiwong all the time over the same route when transporting the logs from the logging area to the defendant's store house, a distance of about 5 miles. He had been using the same method of driving up the slope, and had never got into trouble. But on that day he found the gears suddenly became free on their own. There was a loud sound coming from the engine when the gears suddenly became disengaged. He applied the brakes but the brakes did not hold the heavily loaded vehicle most probably due to the wet brakes. I believe what the plaintiff told the Court since he was the person driving the vehicle.

DW2 told the Court that whenever he thought he was in a dangerous situation, he would look at the driver through the hole in the driver's cabin to see what the driver was doing. He had looked at the driver when the lorry had come to a stop before clearing the slope. What he saw was what he thought the driver was doing, namely trying to engage gear three. Most probably what DW2 saw was that the plaintiff was trying to put back the vehicle in gears to pull the lorry forward and not that the driver was trying to change into gear three. I do not place much weight on this piece of evidence given by DW2, as only the driver (plaintiff) himself knew what he was trying to do at that time. I have no doubt that the plaintiff must have been trying to put the vehicle back in gears to prevent it moving backward but was unsuccessful, and had then applied the brakes. I do not think the process took about five minutes as stated by DW2. It is true that it was easy for DW2 to jump off or abandon the vehicle since he was seated on the logs on the lorry and was not in control of the vehicle. But as for the plaintiff, he was in control of the vehicle. He had to apply the brakes, as releasing them might cause the loaded vehicle to slide faster down the slope. It was unfortunate that in the process the vehicle overturned, and the driver fell off the vehicle and was pinned under it. I therefore, do not accept the evidence of DW2 that plaintiff was trying to change gears while climbing the slope.

My finding is that the accident was due to the failure of the santaiwong's gears to remain in place. The disengagement of the gears by themselves was beyond the control of the plaintiff. The plaintiff had done all he could under the circumstances to prevent an accident happening. I do not attach any blame to him.

On the part of the defendant, he had not only given plaintiff a santaiwong with an old engine to drive, he had entrusted the repairs of the vehicle exclusively to the plaintiff who was not a mechanic. There is no evidence that he had even once sent the santaiwong to, or had the engine properly checked by, a proper mechanic.

Halsbury's Laws of England, 3rd Edn. Vol. 25, para. 978, p. 511, states:

> Provision of proper and suitable plant and appliances: Among the master's basic obligations is that of taking reasonable care to provide proper and suitable plant and appliances and moreover to maintain them in a reasonably safe condition. The master cannot by delegating this duty to someone else escape liability if it is not properly performed. A master who, for the use of his workmen, buys a new tool ready-made from a reputable source is not, however, liable if it is subsequently shown to have latent defect due to negligent manufacture, because the manufacturer was not at the relevant time carrying out the master's duty for him. The duty to provide safe appliances extends to cover all such acts as are reasonably incidental to the daily work.

In *Henderson v. Henry E. Jenkins & Sons* [1970] AC 282, the brake of a lorry while descending a hill, suddenly failed. The failure was due to the sudden escape of brake fluid from a hole in the hydraulic brake system. The lorry was about 5 years old, and that the weekly maintenance had included the inspection of the brake pipe in situ. The experts who gave evidence could not determine the cause of corrosion. But it was suggested the corrosion to the brake pipe could have been caused by corrosive substance carried by the lorry or by salt either from the lorry travelling near the sea or passing over snow treated with salt. The House of Lords held:

> that the respondents could not rely on the defence of a latent defect not discoverable by the exercise of reasonable care unless they showed that they had taken all reasonable care in the circumstances: and to do so they had to show that there were no special circumstances in the past use of the vehicle to indicate that the lorry might have been subjected to a corrosive agent resulting in the corrosion of the pipe. Accordingly, since the respondents had not adduced evidence of the past history of the vehicle, they could not rely on the defence of a latent defect and therefore, they had not discharged the inference that they had been negligent.

I therefore, held the defendant totally negligent, and therefore, liable to the plaintiff for damages.

As regards quantum of damages, there was no dispute as to the average monthly earnings of the plaintiff which was alleged to be RM500/-. Two medical reports on plaintiff were submitted in the Agreed Bundle of Documents. The one dated 15 November 1980 states:

> The above named alleged to have been involved in a motor vehicle accident on 25 December 1979. He sought a discharge against medical advice on the day of admission itself, i.e. on 25 December 1979. He came for readmission again on 29 December 1979 having been unsuccessfully treated by the 'Bomoh'. The general condition on admission was satisfactory and he had sustained an intertrochantric fracture of the left femur. He was treated with skin traction on a Thomas Splint for three weeks after which a hip spica was applied. He was discharged from inpatient care on 31 January 1980. He presented for follow up on 12 March 1980, 9 April 1980, 7 May 1980 and 2 June 1980. The fracture showed signs of union. When last seen on 2 June 1980 he was walking on crutches and was complaining of pain in the left gluteal region for which he was treated symetamatically.

The other report dated 15 February 1982 states:

> The above named presented for re-examination on 6 February 1982. He was complaining of pain in the left buttock. The fracture has consolidated as evidenced by radiological examination. His fracture has however united in lateral angulation (coxa vara) and there is shortening of 3.5 cm. of his left lower limb. He needs a shoe with raised heels to compensate for the loss of length. The movements of the neighbouring joints are full range and pain free.

Both Counsel cited past Court awards on the quantum. Damage to clothing of the plaintiff at RM100/- was agreed to by the defence Counsel. I awarded RM12,000/- for pain and suffering arising out of fractured left femur and shortening of 3.5 cm.

The medical report at p. 3 of the Agreed Bundle of Documents states that the plaintiff suffered permanent disablement up to 9 April 1980, theeafter temporary disablement up to 10 August 1980. There is evidence that the plaintiff had to use crutches for about one year. I awarded the plaintiff pretrial loss of earning for 10 months at RM500/- per month.

Also found at [1984] 2 CLJ 241